

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PHILADELPHIA

In Re: :  
: :  
CERTAINTIED FIBER : Case No. 11-MDL-2270  
CEMENT SIDING :  
LITIGATION : Philadelphia, PA  
: February 19, 2014  
-----: 10:13 a.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE THOMAS N. O'NEILL, JR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For CertainTeed: ROBERT L. HICKOK, ESQUIRE  
3000 Two Logan Square  
18th and Arch Streets  
Philadelphia, Pennsylvania 19103

For the Class: MICHAEL A. McSHANE, ESQUIRE  
AUDET \$ PARTNERS, LLP  
221 Main Street - Suite 1460  
San Francisco, California 94105

For the Class: H. LADDIE MONTAGUE, ESQUIRE  
SHANON J. CARSON, ESQUIRE  
BERGER & MONTAGUE PC  
1622 Locust Street  
Philadelphia, Pennsylvania 19103

For the Jabrani  
Objectors: GLENN MANOCHI, ESQUIRE  
GARY LIGHTMAN, ESQUIRE  
LIGHTMAN & MANOCHI  
1520 Locust Street  
12th Floor  
Philadelphia, Pennsylvania 19102

Audio Operator: CHARLES ERVIN

Transcribed by: DIANA DOMAN TRANSCRIBING  
P.O. Box 129  
Gibbsboro, New Jersey 08026-0129  
Office: (856) 435-7172  
Fax: (856) 435-7124  
Email: [dianadoman@comcast.net](mailto:dianadoman@comcast.net)

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**\*\*\* Transcriber's note -- inaudibles are due to the fact that  
Judge O'Neill's microphone is off at approximately halfway  
through hearing**

1 (The following was heard in open court at 10:13 a.m.)

2 THE COURT: Good morning, counsel.

3 ALL COUNSEL: Good morning, Your Honor.

4 THE COURT: I apologize for keeping you waiting. I  
5 was delayed in arriving at the courthouse this morning.

6 COURTROOM DEPUTY: You may be seated, everyone.

7 THE COURT: Mr. Ervin, would you check in the  
8 hallways and just call out and make sure there's no one out  
9 there who wishes to be in the courtroom for this proceeding?

10 (Pause in proceedings)

11 THE COURT: Are we ready to proceed?

12 COURTROOM DEPUTY: Judge O'Neill, I checked the  
13 hall; there's no one out there.

14 THE COURT: Okay, fine. The first item on the  
15 agenda, who will speak for the class counsel?

16 MR. MONTAGUE: Laddie Montague, Your Honor.

17 THE COURT: Okay.

18 MR. MONTAGUE: Ready?

19 THE COURT: You can either speak better here or  
20 whichever.

21 MR. MONTAGUE: No, this is fine. Thank you, Your  
22 Honor.

23 THE COURT: Just make sure you're behind that  
24 microphone --

25 MR. MONTAGUE: I will and I --

1 THE COURT: -- and as you know, you have a deaf  
2 Judge --

3 MR. MONTAGUE: Well, I've got my hearing aid in  
4 also, Your Honor --

5 THE COURT: -- so shout.

6 MR. MONTAGUE: -- and I'll put on the appropriate  
7 glasses.

8 THE COURT: Okay.

9 MR. MONTAGUE: As Your Honor knows, I'm sorry that  
10 we inundated you with so many papers, but this is a matter of  
11 great importance to us. It's a case that involves a  
12 WeatherBoard fiber cement exterior siding, and as you will  
13 recall, the people -- there has been an issue of this  
14 premature failure of this siding.

15 And there's a warranty that covers it there and we  
16 felt that the warranty was not sufficient to cover the damages  
17 that were involved and the fact that the siding became  
18 defective prematurely, so we have brought a lawsuit involving  
19 breach of warranty, breach of merchantability, negligence -- a  
20 whole series of claims and over the years, we have finally  
21 been able to reach a settlement.

22 I'd like to start because I think it's important,  
23 Your Honor, to compare the terms of the settlement with what  
24 owners of the homes would get under the warranty, and I'll  
25 start with the warranty, which is a two tiered type of

1 warranty. The first part deals with the first two years after  
2 installation and if there's a defect that can be proven by the  
3 homeowner or the owner of the structure, CertainTeed agrees to  
4 replace, repair or refund those defective boards, the  
5 defective siding at full cost.

6 After two years, they agree to either repair,  
7 replace or refund for the defective boards, but only the cost  
8 of the boards, not cost of labor and not the cost of paint,  
9 and after two years there's a proration of the cost based on  
10 when the date of installation was.

11 For every year away from the date of installation,  
12 there's a two percent reduction in the amount that they will  
13 pay. That's under the warranty.

14 So under our settlement, the claimants receive and  
15 the class members who have defects in their boards will  
16 receive a lot more, and it's broken down in the following way.

17 If there is five percent or more defective boards on  
18 a particular wall of the house, not only will those boards be  
19 replaced, but the entire wall will be replaced, and it will  
20 not be replaced just for the cost of the boards, but the cost  
21 -- it will be compensated for by the boards -- the cost of the  
22 boards for labor and for paint, and that --

23 THE COURT: Labor and --

24 MR. MONTAGUE: Paint. Labor and paint. And that  
25 figure is being calculated through a -- I guess it's called a

1 book or a service called RSMeans, which is basically the Blue  
2 Book of the construction industry for pricing work and pricing  
3 materials and replacement of things and building of things.  
4 So that's if there's a five percent -- five percent or more of  
5 the boards are defective. The whole -- on a particular wall,  
6 that whole wall gets compensated for.

7 If it's under five percent, then it's just the  
8 boards that are defective, plus the boards that are above it  
9 and below if that's necessary to make it look proper, and  
10 again, that recovery -- that compensation is for not only the  
11 -- not only the cost of the boards, but also the cost of labor  
12 and paint.

13 So it's a substantial settlement. It goes back --  
14 people can make claims all the way back to 1999 when  
15 CertainTeed started manufacturing these products. It also has  
16 a proration provision depending on the date of installation,  
17 and I think that's set forth on page 11 of our brief which  
18 will set forth the actual proration.

19 So that's basically the difference in the -- in our  
20 settlement to the -- the warranty. In addition, our  
21 settlement is open for six years from the time that the  
22 settlement becomes final; that is after all the appeals or any  
23 appeals would be exhausted and there's no more basis for  
24 appeal.

25 The other aspect is if in fact during that six year



1 period, if there is a warranty that is -- I mean if there is a  
2 warranty claim that is submitted by a class member and the  
3 class member may have for some reason not been aware of this  
4 settlement, CertainTeed will submit that warranty claim over  
5 to the claims administrator for our settlement and that claim  
6 -- that claimant, the person who submitted the warranty will  
7 in fact be treated as a claimant under the settlement and be  
8 able to get the benefits under the settlement, assuming that  
9 his damages qualify.

10 So that in a nutshell is the benefit -- substantial  
11 benefit of the settlement over the warranties, and there's a  
12 fund of \$103 million which was put up and was calculated to  
13 cover -- would be adequate to cover that particular -- those  
14 particular claims that we expect since it's not a situation  
15 where every board that was manufactured by CertainTeed was  
16 defective. But there are -- there's enough to make it a  
17 serious issue for enough homeowners.

18 So if I may, I'd now like to turn to the  
19 certification of the settlement class --

20 THE COURT: Well --

21 MR. MONTAGUE: -- unless you have questions.

22 THE COURT: -- first tell me how the money is to be  
23 paid.

24 MR. MONTAGUE: The money gets paid in -- in order --  
25 there's a -- we wanted to make sure that there were enough

1 monies to cover all of the claims that could be made over the  
2 six year period, so when a person -- when a claimant makes a  
3 claim and it's approved, then they will get paid 50 percent of  
4 the amount of their claim -- what they're due under their  
5 claim, which we believe will be more -- that 50 percent will  
6 be more than what they would have received under the warranty.

7 The second -- the rest of the 50 percent or the rest  
8 of the claim assuming up to 50 percent will be paid at the end  
9 of the six year period, and that will ensure that there's  
10 enough funds in the -- left over to pay all of the -- the  
11 funds that are going to be -- all of the claims that are going  
12 to be made over the six year period.

13 THE COURT: But to whom does the defendant pay the  
14 money?

15 MR. MONTAGUE: The defendant pays the money --  
16 there's a payment due after the -- a short -- I don't have the  
17 exact dates but there's a payment made the first year, there's  
18 a \$35 million payment that's made initially and then the next  
19 year I believe there are three or -- there are three payments  
20 of totaling \$22 million for the next two years and then  
21 there's -- another year there's a payment -- three payments  
22 totaling \$11 million, and it comes out to \$103 million.

23 However, if there -- if at any time there is a  
24 shortfall, the defendants will -- there's a formula for them  
25 to advance some money earlier than they otherwise would pay.

1 So there's a -- it's a guarantee they're --

2 THE COURT: Say that again?

3 MR. MONTAGUE: If there ever was a shortfall because  
4 a payment wasn't -- because there's a payment due and there's  
5 not enough money in the pot to cover the existing claims,  
6 there's a basis -- there's a provision for the defendants to  
7 make -- for the defendant CertainTeed to make a quick payment,  
8 an earlier payment --

9 THE COURT: Up to the maximum of 103?

10 MR. MONTAGUE: I think it's based -- I think the  
11 formula says that they can pay up to the amount that was paid  
12 out the last quarter. In other words, the last -- the number  
13 of claims that were paid out the last quarter, they can --  
14 that will accelerate and they'll pay that in earlier, so  
15 there's always a guarantee, and the limit is when you get down  
16 to \$5 million in the pot.

17 If it's under \$5 million in the pot, then they have  
18 to make this abbreviated payment which is equal to what the  
19 claims were out of in the last quarter, so there's a guarantee  
20 that there will always be money in the pot to pay the claims  
21 as they accrue -- pay 50 percent of those claims as they  
22 accrue.

23 Now, with respect to the approval of the settlement  
24 as a class settlement and the class -- I don't think there's  
25 much question about the numerosity, Your Honor. They're

1 approximately -- I mean, I don't think I need to go through  
2 all these things. Is there any -- I'd be happy to just skip  
3 over this if Your Honor --

4 THE COURT: If there's an objection as to class  
5 certification, you can respond to it then --

6 MR. MONTAGUE: Okay.

7 THE COURT: -- but it's certainly numerous with a  
8 common question, that's my --

9 MR. MONTAGUE: Yeah.

10 THE COURT: -- preliminary conclusion.

11 MR. MONTAGUE: Yeah. I would just -- I will say one  
12 thing. If the case were litigated, there would be some  
13 individual questions that you would have to consider in the  
14 predominance area, but because this is a class settlement -- a  
15 settlement class, those issues go away.

16 And what's important I think to the claimants is any  
17 of those defenses -- and we'll get into this a little further  
18 -- any of those defenses that CertainTeed would raise in  
19 litigation are not going to affect the claimants' ability to  
20 recover under the settlement. So, in fact, no one will be  
21 burdened with those defendants -- with those defenses, which  
22 is again a very important aspect of the settlement.

23 So let me go into the settlement itself and the  
24 reasons why it should be approved, and I will basically go  
25 through the four points that are raised by the Cendant

1     Corporation case for a presumption of fairness, and then go  
2     through the Girsh factors to show that this is a very fine  
3     settlement and fair and reasonable and that it should be  
4     approved.

5             The four factors for a presumption of fairness are  
6     the settlement negotiations occurred at arm's length, and they  
7     clearly did that.

8             They've been going on -- they went on for 18 months  
9     and after about a year, they went on before Judge -- former  
10    Magistrate Judge Melinson as a mediator, and they were  
11    eventually resolved, and very hard fought, difficult  
12    negotiations.

13            And even after an agreement in principle was  
14    reached, it took time to negotiate the final settlement and  
15    the terms of the final settlement. So, it was definitely done  
16    at arm's length and vigorously by both sides.

17            Second is the amount of discovery involved. This  
18    was an interesting case because we did a lot of  
19    pre-investigation -- pre-filing investigation, both in terms  
20    of actually talking to people, finding out about the defects  
21    and hiring a forensic engineer who did an investigation and  
22    gave us reports -- you know, analyses and opinions, so that we  
23    knew we actually had a very good credibility with CertainTeed  
24    when we went into the -- when we filed the case because we had  
25    this engineering expert background to support our case.

1           We had a substantial amount of continuing  
2 documentary discovery throughout the case. There were several  
3 depositions taken. The experts visited about 12 homes  
4 throughout the United States in order to help document their  
5 reports and the defects and how they were -- and what their  
6 cause was.

7           As I said, we took several depositions so there is a  
8 substantial amount of understanding of the case from the  
9 beginning and throughout and particularly when the settlement  
10 was eventually reached.

11           The third issue is the proponents of the settlement  
12 are experienced in similar litigation. Actually, Your Honor,  
13 I'm -- in this case, I'm the least experienced lawyer, not in  
14 terms of class, I mean, we're all -- all of the counsel that  
15 were heavily involved have been involved in class actions for  
16 a long time.

17           But Mr. Levin, Mr. McShane -- their firms and my  
18 partner, Shanon Carson, all were involved -- have all been  
19 involved in similar cases like the Shingles case that was  
20 before Judge Pollak, rest his soul. Both Mr. Levin and Mr.  
21 McShane were in that and Mr. Levin is heavily involved in the  
22 Chinese Drywall case, so we learned -- they learned an awful  
23 lot from those cases.

24           It's one of the reasons why this case has been  
25 prosecuted in such an efficient, effective manner, and a lot

1 of it was because of the expertise that had been built up by  
2 the counsel who handled it.

3 The last issue for a presumption of fairness is the  
4 reaction of the class, and it's been minuscule. There are  
5 seven outstanding objections. That comes to -- if you take  
6 the number of mailed notices that were delivered, it's about  
7 -- it's two-tenths of one percent.

8 If you take a look at the hits that were made on our  
9 website -- because we had a website that has all the  
10 information on it, there were approximately 64,000 unique hits  
11 on our website and if you use that as a base, the number of  
12 objections come to one-one-hundredth of a percent. So there  
13 has been an overwhelming acceptance of the settlement and a  
14 minimum of objections.

15 There's also been 21 opt outs of which I think there  
16 are two cases pending by those opt-outs, but again, that's --  
17 for a case of this size, that is an absolute --

18 THE COURT: Where are those cases pending? Just as  
19 a matter of curiosity, do you know?

20 MR. MONTAGUE: I think one of them at least is  
21 before Your Honor and they're asking to be remanded. I think  
22 there's a battle going on about that.

23 THE COURT: Oh, is that the one in Colorado?

24 MR. MONTAGUE: Yes.

25 THE COURT: Yes.

1 MR. MONTAGUE: That's Lionshead. And the other one,  
2 I'm not sure. I just learned about it so I don't know. So,  
3 based on those four points, it is very clear that this  
4 settlement deserves a presumption of fairness.

5 Now, let us get to the particular -- the Girsh  
6 factors. The first is the complexity, and I'm not sure I  
7 really need to go into that.

8 This is a case which is going to -- if it went to  
9 trial it would require a bevy of engineering issues and  
10 economist issues, which are being avoided. There's an array  
11 of defenses that would have to be litigated and I'll get into  
12 those later.

13 There's certainly issues of causation and damages  
14 which are technical, and of course the class certification  
15 issue, so the complexity I think is apparent in this case.

16 The expenses will -- if not -- if not settled at  
17 this time, would mount substantially because of the expert  
18 expenses of their reports, their depositions, their  
19 participation at trial, their response to Daubert motions --  
20 all those expert activities in this day and age add up to an  
21 awful lot of money.

22 There are the other complex litigation issues such  
23 as motions -- you know, various motions practice which is  
24 being avoided, and of course there's the issue of the class  
25 certification. So the expenses would all increase



1 substantially.

2 And the duration of the case if not settled I would  
3 say would be at least another two to four years, by the time  
4 we'd complete pretrial proceedings, there could possibly be a  
5 23(f) class appeal which would delay things, and then  
6 obviously if there's a trial there's post-trial motions and  
7 appeals, and so I think two to four years is a reasonable  
8 additional time of duration if this case were not settled.

9 I've already gone over the reaction to the class,  
10 which is the second Girsh factor so I won't repeat that, and  
11 I've basically gone over the third state which is the state of  
12 proceedings and amount of discovery completed. And by the  
13 way, Your Honor, to be precise about that, it's set forth in  
14 the declaration of Shanon Carson which was filed along with  
15 our settlement papers.

16 The next issue is the risks of approving liability  
17 and damages and maintaining the class, and I have to say, the  
18 one thing that was apparent for every objector is before the  
19 Court today and those that weren't are no longer before the  
20 Court because they withdrew their objections, not one of them  
21 either recognized or addressed the risks of litigation in this  
22 case.

23 And, I mean, to me that is a total fallacy and a  
24 fatal mistake that each of them made because their objections  
25 are in a vacuum without understanding the realities of what

1     this case is and what the risks are.

2             CertainTeed has raised a litany of issues which  
3     could threaten the case. I mean, no one knows how they would  
4     all turn out, but I will go through them. First they say that  
5     the siding met industry and ASTM standards and therefore it  
6     was fine.

7             Secondly, they say that our claims for negligence at  
8     least are barred by the Economic Loss Doctrine, they say that  
9     the limited warranty under contract is the exclusive remedy.  
10    They say that improper installation and storage could be the  
11    cause of the failure of the boards that are being claimed as  
12    damaged.

13            They say that any defects were limited  
14    geographically and time wise so it's not a full -- it doesn't  
15    go across the class completely, and I have to say that our  
16    experience to date has confirmed that.

17            They would -- they say that -- they claim that we  
18    would have to show that each -- that the manufacturing defect  
19    caused each type of damage that is being claimed, whether it  
20    be the boards shrinking or whether they be warped or cracking  
21    or something like that. They have to show that the defect in  
22    manufacturing caused each one of those.

23            They would also for our claims impose the statute of  
24    limitations under the various state laws and that's another  
25    issue that they would raise, that there are different state's

1 laws that have to apply. And of course they would have an  
2 opposition to how we prove our damages. So there are a  
3 tremendous amount of risks involved and I think as Judge  
4 Pollak said in the Shingles case -- it was a very simplistic  
5 statement, as he always made, "Victory for the class is not  
6 assured." I think that's very appropriate.

7 The next thing is the risk of establishing damages,  
8 and frankly I don't want to give a lot of emphasis to that  
9 because we are lucky to have this RSMeans -- I call it a Blue  
10 Book but it's whatever book that is used which can actually  
11 measure the cost of things, so I think there are always risks  
12 for damages, but this is not something that seems to be  
13 insurmountable.

14 Next is the risk of maintaining class through trial  
15 and appeal, and that is always a risk, particularly in this  
16 day and age, Your Honor, when the recent case law has made  
17 class certification so much harder than it was five, ten, even  
18 three years ago with the Supreme Court rulings and various  
19 other rulings that have come down.

20 It's a very tough issue for plaintiffs in this day  
21 and age. And as I said before, there are certain issues which  
22 would be raised that could be a threat to class certification  
23 if litigated, which this settlement obviates and eliminates.

24 So, I think there would be a tremendous risk to the  
25 plaintiffs of having this case certified as a class through

1 trial. Not that it wouldn't be, but there's certainly a  
2 substantial risk.

3 The ability of CertainTeed to withstand a greater  
4 judgment, Your Honor, that really didn't come into the  
5 negotiations so I don't want to make that really a factor one  
6 way or the other. It was never an issue.

7 The range of reasonableness in light of the best  
8 possible recovery and attendant risks of litigation, I think  
9 understanding, number one, that this is an all cash  
10 settlement, there's no reversion to CertainTeed at all, all of  
11 the monies go to the class and the awards that this Court is  
12 going to make.

13 And there is no cy pres provision. All of the  
14 monies will be distributed and we are going to hand up today,  
15 Your Honor, an addendum to the settlement agreement which  
16 will, if there's money left over at the end of the six year  
17 period after all of the claimants are paid up what they're  
18 owed from their claims, the remaining money will remain  
19 available for future claimants until it runs out.

20 So, we are going to hand up an addendum to Your  
21 Honor which we'll -- the parties have agreed to, so there is  
22 an assurance that all of the funds will be used to pay the  
23 class.

24 If the -- it's hard to say what is the best result  
25 that we could have, I guess we would have to say, one, the

1 class would be certified, there would be a finding that the  
2 common manufacturing defects caused each of the injuries that  
3 were to the -- to the boards that were -- that are being  
4 claimed and that the compensation for those boards would be at  
5 least what this RSMeans calculation would yield.

6 And I think the settlement itself compared to that,  
7 Your Honor, comes very close to achieving that, if it doesn't  
8 not only achieve that and perhaps more.

9 And our expectation is that all of the claims --  
10 there's a good chance that all of the claims will be paid in  
11 full. In other words, that the first 50 percent payment there  
12 will also be a second 50 percent payment or very close to it.

13 And as I said before, I believe that the first 50  
14 percent payment will exceed what the claimant would receive  
15 under the warranty and that is because (a), that what's being  
16 paid for is more, it includes not only the material, but the  
17 cost -- the labor and the paint cost, and also it includes  
18 more boards -- substantially more boards with respect to a  
19 particular wall.

20 CertainTeed on the other hand thinks that the best  
21 result would be that no one could get anything other than what  
22 is -- they're entitled to under the warranty, so I think the  
23 upshot of all of this is, (one), there is definitely a  
24 presumption of fairness, and (two), the Girsh factors clearly  
25 support this settlement.

1 I would like to point out a couple things because I  
2 found them quite important, and that is that this settlement,  
3 the way it's structured, is very friendly to the claimants,  
4 it's not one that makes life difficult. There's been some  
5 objections that the claim form is difficult and things like  
6 that.

7 The claim form is no different than what --  
8 basically what they would have to prove under the warranty.  
9 And, it's important that we have a process where we can guard  
10 against fraud and improper claims because, you know, without  
11 this process, people could file claims where they don't  
12 actually have CertainTeed boards.

13 So, it's important that we have a process where we  
14 can be careful that the claimant is actually entitled to what  
15 they are claiming, and while that does require some onus on  
16 the claimant, it's important for the fairness of the  
17 settlement.

18 But there are a couple aspects that I would like to  
19 point out. First we sent -- if you remember at the beginning  
20 I mentioned that there was this -- this first two year  
21 warranty where they get full costs and so forth, but again,  
22 just for the boards what were damaged, if in fact someone has  
23 made a -- has a claim and they fall under that first two year  
24 period, they can recover under the Sure Shot -- what's called  
25 a Sure -- what's it called, I forget the name of it --

1 UNIDENTIFIED SPEAKER: SureStart.

2 MR. MONTAGUE: SureStart, it's a SureStart  
3 protection. But they can still file a claim and if they would  
4 get a greater amount under the claim and our settlement, they  
5 can -- they can recover under the settlement but of course it  
6 would have to be a setoff of what they get from the SureStart  
7 protection warranty, so that's a very important aspect that  
8 benefits folks.

9 There is a provision that allows two opportunities  
10 to the claimant to -- guarantees the claimant two  
11 opportunities to correct its claim if it's rejected for any  
12 reason because of technical reasons or it doesn't have enough  
13 information.

14 It's not going to be rejected outright, they're  
15 going to get two opportunities to correct it. In line with  
16 that, if someone files a claim for particular boards and it's  
17 rejected because they're not damaged enough, within a year  
18 after that rejection they can resubmit their claim for those  
19 boards because maybe in another year they've been damaged more  
20 or their condition is worse.

21 So because they've been rejected at point A doesn't  
22 mean they can't re-file after a year or earlier actually under  
23 certain circumstances if at point B they have the actual  
24 damage manifest itself to a greater degree.

25 And of course if their claim is rejected they have

1 the right to appeal that to an independent reviewer who is  
2 selected by class counsel so I think there are an awful lot of  
3 protections and safeguards which encourage people to file  
4 claims and encourage them to get them submitted properly and  
5 paid.

6 So that is basically in a nutshell why the  
7 settlement should be approved. The Girsh factors are  
8 accepted, the presumption is accepted, the friendliness of the  
9 case is -- the friendly nature towards claimants is very  
10 important and of course the amount of the funds which all go  
11 for class purposes and no revision or no cy pres is more than  
12 adequate.

13 Does Your Honor has any questions at this point?

14 THE COURT: Not at present. Thank you.

15 Mr. Hickok. Mr. Hickok? When I made up the agenda,  
16 I'm afraid that I inadvertently omitted you to give you space,  
17 so I'll be glad to hear you should you wish to say anything.  
18 Sorry about that.

19 MR. HICKOK: No problem, Your Honor. Good morning,  
20 it's good to see you. Just very briefly, we agree with Mr.  
21 Montague's description of the settlement. It provides  
22 significant enhancements to the warranty that would otherwise  
23 be available to class members.

24 As he said, it was negotiated at arm's length. We  
25 raised significant defenses in the case and we were prepared



1 to litigate the case if we were not able to reach a settlement  
2 based on arm's length negotiations. Retired Magistrate Judge  
3 Melinson was very helpful in presiding over a mediation that  
4 enabled the parties to make substantial progress in what was  
5 ultimately negotiated.

6 Here we agree that under the Cendant factors the  
7 settlement is entitled to a presumption of fairness and we  
8 agree that under the Girsh vs. Jepson factors the settlement  
9 is fair, reasonable and adequate and should be approved by the  
10 Court. If Your Honor has any questions I'd be happy to  
11 address them.

12 THE COURT: All right, thank you.

13 MR. HICKOK: Thank you, Your Honor.

14 THE COURT: Very well. Mr. Lightman?

15 MR. LIGHTMAN: Good morning, Your Honor. Mr.  
16 Manochi will make the presentation on behalf of the Jabrani  
17 objectors.

18 THE COURT: Very well.

19 MR. MANOCHI: May I approach, Your Honor?

20 THE COURT: Of course.

21 MR. MANOCHI: Thank you.

22 THE COURT: I don't remember that you've been before  
23 me before so I'll warn you, you have a deaf Judge so don't be  
24 afraid to shout.

25 MR. MANOCHI: I don't -- I don't have a problem,

1 Your Honor, as long as you shout back at me because I'm  
2 starting to have that same problem.

3 THE COURT: Okay.

4 MR. MANOCHI: All right, thank you.

5 THE COURT: Get right behind that mic.

6 MR. MANOCHI: Good morning, Your Honor. My name is  
7 Glenn Manochi from the law firm of Lightman & Manochi and  
8 we're here today on behalf of the Jabrani objectors. We have  
9 a set of papers that have been on file with the Court and we  
10 would --

11 THE COURT: I've read your papers.

12 MR. MANOCHI: Thank you. And what I wanted to do  
13 was take a few moments in my 15 minutes to highlight some of  
14 the issues that I think still remain, even after the  
15 presentation that has been made by --

16 THE COURT: If you go over a few minutes, I'm not  
17 going to cut you out.

18 MR. MANOCHI: Okay, thank you. I appreciate that  
19 latitude. I think primarily the biggest issue that we have is  
20 although class counsel today mentioned a number of factors  
21 that need to be determined in order to approve the settlement,  
22 there's another one that was raised by In Re: Baby Products  
23 Antitrust Litigation which was decided a year ago today, that  
24 this Court has an additional duty which is to actually  
25 determine what the actual value of this -- this settlement is

1 going to be.

2 And the Third Circuit instructs the District Court  
3 to actually not just rely on what attorneys are saying, but to  
4 actually hear some sort of evidentiary proof that establishes  
5 what the basis is and what the settlement size is going to be.

6 I think if we kind of go through the papers that  
7 have been submitted, I think they fall woefully short of the  
8 obligation which if you'll -- Your Honor will understand kind  
9 of comes in a little bit later with regard to the size of the  
10 attorney's fees award that Your Honor is being asked to make  
11 today.

12 I think the first one is -- although class counsel  
13 says this is a \$103.9 million settlement, if I'm reading the  
14 settlement agreement right, there's \$2 million that has been  
15 deposited so far.

16 There's another 35 million that comes in 30 days or  
17 60 days after the effective date, and then there is a year one  
18 which is 23 million, a year two which is another 23 million, a  
19 year three is 11.15 million, and then in year four another  
20 11.15 million and those are put in in periods of time over  
21 that.

22 The concern that we have is that there's no proof  
23 before this Court made by anybody that CertainTeed for  
24 instance has the financial wherewithal to actually make those  
25 payments, and we're concerned with timing.

1           And we can discuss that a little bit in terms of  
2 attorney's fees and when those will be awarded, but our  
3 primary concern is that there's no evidence in front of this  
4 Court that CertainTeed has the ability to make the payments  
5 that they say they do.

6           We would have liked to have seen some sort of  
7 affidavit by the financial CFO of the company for instance or  
8 maybe -- maybe having them post some sort of letter of credit  
9 that actually locks in that the money that everybody says is  
10 going to come in today we have -- it is actually going to be  
11 there four years from now when they have the obligation to do  
12 that.

13           You know, we're concerned with issues like  
14 bankruptcy for instance, which could eliminate the settlement  
15 altogether. There's no proof there and we think that while  
16 based on Baby Products, there has to be a little bit more than  
17 just counsel standing here today without any underlying  
18 declarations of any expert that says -- or anybody from  
19 CertainTeed that says we got the money.

20           The other aspect of this which we haven't seen is  
21 there's this notion here -- and everybody in this room will  
22 freely admit that there was and has been already a limited  
23 warranty in place -- that's going to continue in place kind of  
24 running parallel with the settlement agreement. Based on  
25 statements that have been made, we don't think that the size

1 of the settlement fund can really be determined to be \$103.9  
2 million simply because there is a value that has already been  
3 out there with the limited warranty program.

4 There's been no showing whatsoever outside of a --  
5 of one paragraph that I think that Mr. McShane has in his  
6 moving declaration that says well, it's \$3.8 million, there's  
7 no basis for how he arrives at that and given the amount of  
8 discovery that class counsel says has occurred.

9 And if you actually read their moving papers,  
10 they've had absolute access to all the warranty claims that  
11 have been filed -- the 19,520 warranty claims that CertainTeed  
12 has made during the nine or ten or 11 years that are -- that  
13 it had been going on, so we think that there's clearly the  
14 ability to come up with a dollar number other than relying on  
15 what a statement is that counsel made.

16 So we don't think this is a \$103.9 million  
17 settlement, we think that there's got to be some sort of proof  
18 that's presented to this Court to actually take out the  
19 incremental value of the limited warranty which existed before  
20 the first lawsuit in this case was ever filed.

21 The next aspect of the settlement that is troubling  
22 is again, the lack of proof to actually show what is the fair  
23 range of what the actual claims warranties are going to be  
24 that are going to come under this settlement agreement.

25 Again, I would point out to the fact that, you know,

1 Mr. Cole, who was the warranty manager, has provided to class  
2 counsel all the information with regard to existing warranty  
3 claims. We have also class counsel in their moving papers  
4 also say that they have received from CertainTeed a list of  
5 every warranty claim that's been filed for the last ten years  
6 from -- I think maybe from 2001 through 2012, roughly  
7 speaking.

8 We're troubled here that given all this information,  
9 there's no way and nobody who's actually set forth any  
10 evidence to determine what the range of the size of the  
11 settlement is going to be -- you know, there's issues with  
12 regard to that not everybody is going to have qualifying  
13 damage under this settlement.

14 There's issues with regard to well, how many walls  
15 of the buildings are going to be replaced. All of that can be  
16 determined we believe on information that's already there, yet  
17 no effort has been made by class counsel to carry what we  
18 believe is their burden under Baby Products to actually show  
19 this Court what the actual range of the settlement is going to  
20 be.

21 We're also troubled -- well, not troubled, but we  
22 don't -- we have this notion here too, is that in Cole's  
23 affidavit that was submitted in support of the final moving --  
24 he is again the warranty manager for CertainTeed -- he says in  
25 document number 87-4 that his team has processed during the

1 limited warranty time -- limited warranty program, 19,250  
2 claims. And then he goes on to say -- which was necessary for  
3 the purposes of the notice, that there were 3,755 names  
4 generated with open, pending or rejected claims, okay?

5 And there's also a statement in his affidavit that  
6 says the rest of them had been resolved. So my math basically  
7 says that there's 15,495 claims that have already been  
8 resolved, so I'm not sure and I'm not sure anyone in this room  
9 here sitting today is sure as to how many of those should be  
10 subtracted from the actual projected value of what this  
11 settlement is going to be because the settlement agreement  
12 provides that once you've made your claim and resolved it, you  
13 don't have the ability to do anything else with regard to the  
14 settlement agreement that's here.

15 So there's this issue of close to 15,500 claims that  
16 shouldn't be included in any estimate of what the value of  
17 this settlement is going to be because they've already been  
18 resolved.

19 THE COURT: Well, I don't quite understand that. In  
20 other words, if -- and I'll ask Mr. Hickok to respond to this,  
21 but if in fact CertainTeed is going to pay \$103 million, then  
22 that's the value of the settlement however it's distributed  
23 among claimants.

24 MR. MANOCHI: Right, but I think the issue here,  
25 Your Honor, is the fact that what happens if everybody's claim

1 gets paid 100 percent, okay? And let me just do a little math  
2 for you because I think that may help you. Their papers are  
3 saying that a relative -- there's approximately 300,000  
4 structures out there with CertainTeed cement board siding.  
5 Their claims rate is one percent, according to Mr. McShane.

6 You then take what they've said in their notice  
7 papers. If every single house has qualifying damage, the  
8 entire amount, the papers using -- the papers say that using  
9 the RSMeans test, to re-clad every house on average will be  
10 \$14,000, okay? And we're assuming that means the siding and  
11 includes -- and assuming that means the labor.

12 If you do the math of 3,000 times 14,000, that's the  
13 total universe. If everybody files a claim based on the  
14 expected claims rate, there's \$42 million, so that's the total  
15 settlement and that's -- and that's not including -- that's  
16 including 100 percent of the homes all have qualifying damage.

17 THE COURT: So they're going to get additional money  
18 maybe they don't deserve, but they're going to get it. So  
19 their members --

20 MR. MANOCHI: Well, I --

21 THE COURT: -- of the class and they're going to get  
22 the money.

23 MR. MANOCHI: Then I guess what we need to look at  
24 is to look at the actual language that's going to be set forth  
25 with regard to the reversion area interest because I hear



1 that, but settlement agreement --

2 THE COURT: Well --

3 MR. MANOCHI: -- itself does not --

4 THE COURT: Well --

5 MR. MANOCHI: -- contain any language of what  
6 happens if everybody gets paid off.

7 THE COURT: Well, you have what amounts to a  
8 judicial admission in open Court. That's legally binding on  
9 every party that's represented in this courtroom.

10 MR. MANOCHI: Okay, well I see that, Your Honor. I  
11 think that that raises a whole other set of problems as to  
12 whether or not the notice that was sent out originally is  
13 adequate based on the fact that there's no language in the  
14 settlement agreement that everybody had the right to look at  
15 and comment on that says it's reversionary.

16 THE COURT: Well --

17 MR. MANOCHI: It's non-reversionary.

18 THE COURT: -- was it your client or someone else's  
19 that objected without even reading the settlement agreement?

20 MR. MANOCHI: Well, that's why they -- that's why  
21 they hire counsel, Your Honor.

22 THE COURT: Well, you object without even knowing  
23 what you're objecting to.

24 MR. MANOCHI: Again, Your Honor, we're here to  
25 represent the class and we're here with a set of objections

1 that we believe apply to all class members.

2 THE COURT: Well --

3 MR. MANOCHI: But I appreciate that comment, Your  
4 Honor.

5 THE COURT: Not really. It's like the English  
6 barrister who says with great respect, my lord, when he means  
7 exactly the opposite. Okay, go ahead.

8 MR. MANOCHI: Thank you, Your Honor. I harassed  
9 you, you got me. I'm sorry. Okay, I understand the comment  
10 too that the fund is non-reversionary.

11 Again, I certainly -- I think and I would hope that  
12 Your Honor would require that something be put forth, either  
13 on the record or more importantly on the docket so people who  
14 have the ability to look at this case in the future and look  
15 at the settlement in the future will be able to actually  
16 understand --

17 THE COURT: It is on the record right here in open  
18 Court.

19 MR. MANOCHI: I know, but the problem is I don't  
20 know if it -- I think there needs to be some further notice  
21 than here in requiring class members to go -- if they do read  
22 the settlement agreement, to determine whether or not this is  
23 reversionary or not.

24 I think that a person's determination on whether  
25 they want to proceed, I think that becomes an important aspect

1 that needs to be somehow out there to modify the settlement  
2 agreement as it exists because you're going to have people  
3 over the next six years who are going to be able to say -- who  
4 look at what we think is not going to be a complete record in  
5 terms of determining how it is and what rights they actually  
6 have under the settlement agreement.

7 And, you know, we also have the same comment with  
8 regard to the existence of the warranty which the Juelich  
9 objectors had -- said well wait a minute, it's not really  
10 clear, it's not clear in there whether the limited warranty  
11 that existed before continues on.

12 Now there's been two filings that have also been set  
13 forth in the docket that I think need to be somehow related  
14 with some certain -- certain sense of adequate notice to the  
15 class members so they actually understand what their -- their  
16 rights are given these -- the amendments subsequent to the  
17 notice that was sent to them.

18 THE COURT: I think you have a message coming up.

19 MR. MANOCHI: Excuse me?

20 THE COURT: I think you have a message coming up.

21 UNIDENTIFIED SPEAKER: Sorry, Your Honor.

22 MR. MANOCHI: Okay, I guess the one comment I have  
23 with regard to at least what we think is the value of the  
24 settlement if everybody gets paid off, there's still we think  
25 even after the attorneys are paid off, there's going to be \$40

1 million left over. Am I -- am I hearing it right, Your Honor,  
2 that the class action counsel and CertainTeed today are  
3 agreeing that even if there's more money than pays off 100  
4 percent of all claims for everything, do the class members who  
5 participate get that money?

6 THE COURT: I will ask counsel to respond to that.

7 MR. MANOCHI: And if that is the case, then I  
8 absolutely think that you have to re-notice the settlement  
9 here because that is an entirely different thing.

10 I mean, if they're saying that, there should be  
11 notice that goes out to class members that says what you will  
12 get depending on the claims more than -- you may get more than  
13 you're ever entitled to even if this was -- even if you agreed  
14 to the settlement terms. But I'll leave that to Your Honor to  
15 determine.

16 We also have -- and I don't know if this is the  
17 appropriate part of the presentation, Your Honor, to determine  
18 the attorney's fees aspect of the case --

19 THE COURT: That's a later item in the agenda.

20 MR. MANOCHI: Okay, then I will withhold my  
21 comments. I understand I'll have a right at that point.

22 THE COURT: Right.

23 MR. MANOCHI: Thank you, Your Honor.

24 THE COURT: Yes, absolutely.

25 MR. MANOCHI: And we also incorporate based on our

1 papers the inter-class conflicts that were raised in our --  
2 the intra-class conflicts that were raised in our objections  
3 with regard to that and we rely on the paper there. And then  
4 we'd also ask -- we'd also ask based on the motion that we  
5 filed late Monday evening that the Court grant our motion for  
6 leave to file supplemental objections and that they be entered  
7 as of the record so that we can rely on those as well.

8 THE COURT: All right, fine, file supplemental  
9 objections, but they have to come in very quickly and they --

10 MR. MANOCHI: Say again?

11 THE COURT: They have to come in very quickly.

12 MR. MANOCHI: They're in there, they've been signed.  
13 If you look at I think Docket Number 106 or --

14 THE COURT: Oh, they're already in?

15 MR. MANOCHI: They're in, they've been signed.  
16 They're attached to our motion for leave to file.

17 THE COURT: Okay, I'll consider them filed.

18 MR. MANOCHI: If you could look at those we would  
19 greatly appreciate that and we thank you for your time, Your  
20 Honor.

21 THE COURT: Thank you. Mr. Montague, before you get  
22 up I'd like to hear from Mr. Hickok about CertainTeed's  
23 financial ability over a period of six years to make this  
24 payment.

25 MR. HICKOK: Yes, Your Honor, as Mr. Montague

1 explained, the payment obligation is over a period of four  
2 years with a --

3 THE COURT: Four years.

4 MR. HICKOK: Four years, with a \$35 million payment  
5 due upon the effective date of the settlement, so essentially  
6 one third of it will be paid immediately. CertainTeed is a  
7 company that's been in business for over 100 years, it's got  
8 more than 6,000 employees.

9 It's part of the company Saint-Gobain, a French  
10 multi-national corporation. It is pure speculation to say  
11 that CertainTeed does not have the financial ability to make  
12 this settlement. There's absolutely no basis to say that  
13 other than pure speculation.

14 The company has been running its existing warranty  
15 program for this product for a period of at least 13 years  
16 without issue, and it's really a straw man that's been raised  
17 without any substantiation whatsoever.

18 Your Honor, with respect to the issue of a reversion  
19 under the settlement, there is no reversion under the  
20 settlement. Under the terms of the settlement, it's very  
21 clear that CertainTeed is obligated to make these payments  
22 over a period of four years.

23 There is nothing that speaks to any money at any  
24 time being reverted to CertainTeed and in every settlement  
25 that I have ever seen that has a reversionary feature to it,

1     there is expressed language setting forth what that  
2     reversionary feature is. There is no such language in this  
3     settlement and the obligation to pay is stated expressly the  
4     obligation to pay over a period of four years of 103.9  
5     million.

6             It could not be clearer in my view that there is no  
7     reversion to this settlement. As you've noted, we've stated  
8     it in open Court that there is no reversion to the settlement  
9     and again, I believe that is a straw issue that has been  
10    raised here.

11            Your Honor, with respect to the amount of any monies  
12    being left over, I believe the Plaintiff Steering Committee  
13    will address that, but as Mr. Montague said earlier, to the  
14    extent that there is additional money beyond what would be  
15    paid to claimants who claim during the six year claims period,  
16    that money will be paid to any additional claimants who come  
17    forward thereafter.

18            And again, it's speculative that there would be, you  
19    know, huge amounts of money that go unpaid here, but it's  
20    clear that that money does not revert to CertainTeed in any  
21    way and it's clear that that money will be paid to claimants  
22    as long as that money lasts for the benefit of the class.

23            If Your Honor has any other questions, I'd be  
24    happy --

25            THE COURT: Mr. Montague you say is going to address

1     that point?

2                 MR. HICKOK:   Yes, Your Honor.

3                 THE COURT:   Fine.   Thank you, Mr. Hickok.

4                 Mr. Montague?

5                 MR. MONTAGUE:   Thank you, Your Honor.   I was  
6     listening to Mr. Manochi's objections and I don't understand  
7     why he's --

8                 THE COURT:   Yell into that microphone.

9                 MR. MONTAGUE:   I'm sorry, I was listening to Mr.  
10    Manochi's objections and I really couldn't understand why he's  
11    objecting.   He says there's going to be money left over.   It  
12    reminds me of what Senator Lieberman said when he was running  
13    for Vice President and he said what am I going to do if the  
14    inauguration is on the Sabbath, him being an Orthodox Jew, and  
15    his mother said you should have such a problem.

16                You know, I think that's really -- this is an  
17    unusual issue.   If there is money left over -- and we've  
18    addressed that, and I will read that if I may into the record,  
19    Your Honor, the addendum that we are handing up today which  
20    has been signed by the class counsel and by CertainTeed's  
21    counsel.

22                "Plaintiffs and CertainTeed hereby agree to the  
23    following addendum to the corrected agreement of compromise  
24    and settlement.   If the settlement fund has not been exhausted  
25    following the expiration of the claims submission period, the



1 claims submission period will remain open for as long as there  
2 are remaining funds," that is that six year period will  
3 remain open. "The claims administrator will continue to  
4 accept claims from settlement class members until the  
5 settlement fund is exhausted."

6 "Settlement class members who submit eligible claims  
7 during this extended period of time will receive a one time  
8 payment for their claim according to the proration schedule in  
9 section 7.2C of the settlement agreement up to the point the  
10 settlement fund is exhausted."

11 "The claimant's administrator will pay claims in the  
12 order in which they are received after the end of the claims  
13 submission period until the settlement fund is exhausted."

14 The question of what happens if CertainTeed goes  
15 bankrupt, a highly speculate thing. If CertainTeed goes  
16 bankrupt, Your Honor, this litigation is not worth what's in  
17 the warranty so it's a meaningless question and in particular,  
18 it's so speculative in light of the strong financial position  
19 of CertainTeed, its history and its association with  
20 Saint-Gobain.

21 Then Mr. Manochi is certainly anxious to spend more  
22 of the class's money by asking for more notice, which every  
23 class member already has notice of the website so anything put  
24 on the website they will have notice of. It's routine once  
25 there's a website established and the class has had notice of

1 it that changes can be made on the website and that  
2 constitutes notice, so I don't see his objection there as  
3 anything other than spending more money --

4 THE COURT: This will be put on the website?

5 MR. MONTAGUE: Excuse me?

6 THE COURT: This will be put on the website?

7 MR. MONTAGUE: Absolutely, absolutely it will be put  
8 on the website. So as are all of the -- I believe if I'm not  
9 mistaken that all of the filings in this case are on the  
10 website so everything is open.

11 There's nothing hidden and the class has full notice  
12 of everything and the opportunity to find out anything they  
13 want. And of course there also are telephone numbers on the  
14 website so anyone can call and ask a specific question.

15 The last thing I just want to address, and Mr. Levin  
16 probably will get into this -- may get into this somewhat, but  
17 this conflict that was raised by -- not by these folks but by  
18 another group of objectors who have withdrawn their  
19 objections, and Mr. Levin will address the issue of why they  
20 should not have the opportunity to take advantage of those  
21 objections.

22 But I'd like to answer it anyway because I'd like  
23 the Court to know about it. There's a case in the Third  
24 Circuit called D-E-W-E-Y, Dewey vs. Volkswagen, 681 F.3d 170  
25 at pages 185 and 186, it's a Third Circuit case in 2012. And

1 basically what it says is where the class representatives have  
2 the same interests because they can make additional claims as  
3 people who may have delayed claims, there's no conflict of  
4 interest.

5 Here's what we have here. We have three different  
6 situations. We have people that have damage of five percent  
7 or greater of the wall, less than five percent of the wall, or  
8 have no damage at all.

9 Well, the class members may have damage -- their  
10 entire home or their entire structure is not damaged so they  
11 still have -- even if they make a claim for an entire wall for  
12 five percent damage or more of an entire wall, they still have  
13 an interest to make sure that if they have damage to another  
14 wall that is less than five percent or if they have no claim  
15 at all, how their interests will be handled.

16 So, their interests are identical to the absent  
17 class members regardless of what category they fall into.

18 So unless all of the walls of a class representative  
19 are defective, every class member -- every class  
20 representative and class member are potentially eligible under  
21 the settlement for either the -- one of the three categories  
22 where they can file a claim under the plus-five percent, the  
23 less than five percent, or they have no damage at all until  
24 after the settlement ends -- the settlement period ends and  
25 then they still have their claims under the warranty.

1           Everybody is in the same position. Everybody had  
2           the same interest to protect where they might be at any  
3           particular point in time so their -- under the Dewey case,  
4           it's very clear there is no conflict of interest whatsoever.  
5           Did you follow that? Thank you.

6           THE COURT: Thank you.

7           MR. MONTAGUE: Thank you.

8           MR. LIGHTMAN: May it please the Court, may I just  
9           request two points of clarification for the record? It's Gary  
10          Lightman on behalf of Jabrani people. Point number one would  
11          be with respect to this reversionary fund.

12          The way the settlement has been explained in notice  
13          to the class and this morning, if there's an excess fund at  
14          the end of the six year period, their proposed solution as I  
15          understand from this addendum that's being handed up is  
16          they're going to extend the claims period and people can  
17          object beyond the required claims submission period and --

18          THE COURT: People can't (phonetic) object.

19          MR. LIGHTMAN: People can -- excuse me, submit  
20          claims after the six year period and the claims administrator  
21          will continue to honor these claims. Under their own  
22          paperwork though they expect 3,000 claims at an average of  
23          14,000 per claim which they calculate to be \$42 million to be  
24          paid out under the settlement if the expected number of claims  
25          -- the 3,000 claimants make claims, which means they're going

1 to put 103 million in escrow or into the settlement pot, they  
2 expect to pay approximately \$42 million which leaves \$61  
3 million in this pot, and let's even give them the benefit of  
4 the doubt and double the claims so that instead of \$42 million  
5 being paid out \$84 million is being paid out.

6 There is still between \$20 million and \$60 million  
7 in this pot that they propose to resolve by extending the  
8 claim periods for anybody else who wants to make a claim. In  
9 practical effect, if people don't make a claim within the  
10 first years, they're not likely to get a bunch more claims  
11 after the six year period.

12 And what if no one else makes a claim? What happens  
13 to the money? It sits in this pot forever so another six  
14 years go by and you have the original 3,000 claimants they  
15 expect to make claims during the six year period, and let's  
16 give them the benefit of the doubt, another 3,000 come forward  
17 in year seven --

18 THE COURT: The basis of your objection was it  
19 wasn't clear that it would not go back to CertainTeed, okay?  
20 It's now clear, if it wasn't before, that it does not go back  
21 to CertainTeed.

22 MR. LIGHTMAN: From the representations made on the  
23 record, I would agree with Your Honor. Then my followup  
24 question based upon what happened this morning is what happens  
25 to the fund? After 12 years when no objectors are left, what

1 happens to the \$20 or \$60 million or whatever million is left  
2 in there? It shouldn't just sit in the pot. There should be  
3 a provision made for the class that's settling their claims to  
4 benefit from that instead of it just sitting there.

5 That's my first objection is even after all  
6 objections are done, there's still this pot. What happens to  
7 it? And I don't think that's been addressed.

8 My second point of clarification that I would ask  
9 that the class action counsel address is they said that all  
10 claimants except for seven including the Juelich claimants  
11 have withdrawn their claims.

12 We've tried to get in touch with counsel for Juelich  
13 to find out what's been promised to them or what led to the  
14 withdraw of the claim, I respectfully submit that Rule  
15 23(e)(5) requires the Court's approval to withdraw an  
16 objection to a class action settlement once made.

17 I would like the class action counsel to state for  
18 the record with respect to Juelich in particular and the other  
19 objectors who withdraw their claims whether or not there was  
20 -- what led to the withdraw of those claims. They would be  
21 the two points of clarification I would ask that the class  
22 action counsel make for the record. Thank you, Your Honor.

23 MR. MCSHANE: Good morning, Your Honor, Michael  
24 McShane for plaintiffs.

25 THE COURT: Yes.

1 MR. MCSHANE: With regard to the Juelich objectors,  
2 I still personally --

3 THE COURT: End of the mic.

4 MR. MCSHANE: Can you hear me? With Mr. Steward,  
5 who's Mr. Juelich's attorney, and he withdrew the objections.  
6 That was his intent. That's why he filed a document called  
7 notice of withdraw of the rejections. Mr. Juelich was not  
8 offered or given any special compensation for doing so. He is  
9 just a class member at this particular point.

10 With regard to this issue of a reversionary fund --  
11 or excuse me, leftover money -- a potential cy pres, Your  
12 Honor, I can assure you that it is very unlikely that there  
13 will be any money left over. I don't know where the objector  
14 counsels came up with the 1 percent, but it's not from us.  
15 They're making this up.

16 If you look at the notice where we do an example of  
17 a potential claim, that is what we think the potential amount  
18 of money will be paid to each class member on average and over  
19 time, we think that will exhaust the fund.

20 Now, it's a conservative estimate so I do believe  
21 rather than receiving 50 percent of the value or the cost of  
22 re-siding their home, I think it's going to be closer probably  
23 to 75 percent. But I would be shocked if there's any money  
24 left over. This illusory objection, this what if there's  
25 money left over as if we have to try to come up with what's

1 going to happen for six years from now, I've never seen it  
2 before, Your Honor.

3 We came up with a plan of distribution and entered  
4 into a settlement because we think this is enough money to  
5 fairly compensate the class members.

6 In my declaration I go through some of my  
7 experiences in other cases and I've been doing this for 25  
8 years, and our estimate of the claims rate and the cost to pay  
9 the claims as they come in, again, in our view, will  
10 thoroughly exhaust the fund, will in all most likely pay them  
11 the amount we estimate in the notice and most likely pay them  
12 even more.

13 If there's money left over at the end, then we'll  
14 keep the claims period open, sure, why wouldn't we? We can  
15 just keep money out. But this -- this notion that there's \$40  
16 million left over out of a \$100 million fund, Your Honor,  
17 there's no basis for that. That's all I have, Your Honor.

18 THE COURT: All right, (inaudible).

19 UNIDENTIFIED SPEAKER: Your Honor, I hope you don't  
20 have difficulty with me with my voice today. If you do, tell  
21 me to sit down because it's all in the brief probably anyway.  
22 Your Honor, what we have seen witnessed today is a scenario  
23 that is playing out throughout the Courts of the United States  
24 in Federal and State Courts.

25 THE COURT: Well, if this is about the (inaudible)



1 lawyer, I simply want to concentrate on the -- on the  
2 substance of the objections that were made.

3 UNIDENTIFIED SPEAKER: Then I will sit down and you  
4 won't have to listen to my raspy voice. Thank you, Your  
5 Honor.

6 THE COURT: I have no motion for sanctions pending  
7 before me and I will tell you frankly I hope that I will not  
8 have one (inaudible).

9 UNIDENTIFIED SPEAKER: You will not.

10 THE COURT: We'll take a short recess.

11 (Recess, 11:23 a.m. until 11:35 a.m.)

12 COURTROOM DEPUTY: You may be seated, everyone.

13 THE COURT: All right, number four on the agenda,  
14 claims motion for attorney's fees and expenses.

15 MR. MCSHANE: Michael McShane, Your Honor. Mr.  
16 Montague is going to handle the attorney's fees motion, but  
17 one other matter regarding the objections. There is a motion  
18 included in their latest supplement regarding the Juelich  
19 objections and they're based --

20 THE COURT: Regarding? Regarding what?

21 MR. MCSHANE: The Juelich objections that were  
22 withdrawn.

23 THE COURT: Yes.

24 MR. MCSHANE: And they're asking the Court to allow  
25 them to adopt them and the reason for that is they like some

1 of those objections and they want to see what will go stick at  
2 the Third Circuit. Your Honor, I've never heard of being able  
3 to adopt or withdraw an objection. They had their chance and  
4 we think that motion ought to be denied, Your Honor.

5 THE COURT: All right, I'll reserve -- if I've said  
6 the opposite before, I'll withdraw it. I'll reserve judgment  
7 on that motion.

8 MR. MCSHANE: Thank you, Your Honor.

9 MR. MONTAGUE: Good morning, again, Your Honor.  
10 This is always hard in a sense because we are asking for a lot  
11 of money. I think that in this case though it is aptly  
12 deserved. The real test -- the test is, Your Honor, these  
13 eight or nine factors that are known as the Gunter factors  
14 from the Gunter case, 223 F.3d at 195, and most of those I've  
15 already covered so I'm just going to mention them but I'm not  
16 going to repeat what I already said because I don't think it's  
17 necessary.

18 Number one is the size of the fund and the number of  
19 persons benefitted. I don't think I need to respond to that  
20 any further. The number of objectors to the settlement and  
21 the fees, I've set that out in the record and I don't need to  
22 respond. The attorneys' skill and efficiency, I mentioned  
23 that before. I would like to mention it again because it is  
24 very germane to this particular petition for fees.

25 As I said, a group of the attorneys here were

1 involved in the Shingles case before Judge Pollak and they  
2 have a great expertise in this area and as a result of that we  
3 were able to make a lot of efficiencies and economies that  
4 other -- other lawyers would not have made, and plus we had a  
5 very good understanding of how these types of cases work and  
6 how CertainTeed works and as a result of that, we were able to  
7 accomplish a lot more in a quicker time without wasting a lot  
8 of time.

9 And in other cases, because more time is put in, I  
10 don't mean to say that it's wasted, but our time here, we were  
11 able to target it more so than in other cases because of the  
12 experience of counsel and I think that is something that we  
13 should not be penalized for but should -- it deserves  
14 applause. And I would ask Your Honor to consider that in  
15 making the award.

16 And again what I mentioned, one of the things that I  
17 think was really key here was our being able to obtain before  
18 filing the case a forensic engineer and in doing some research  
19 beforehand and getting some preliminary opinions because when  
20 we filed the case and we met with CertainTeed and the first  
21 time that we raised the issue of settlement, we had -- we had  
22 credibility because of this.

23 And, we were able to proceed and we both litigated  
24 and negotiated at the same time and it took a long time. The  
25 complexity and duration of the litigation I've gone over

1 earlier and I won't repeat that.

2 The risk of non-payment is the next factor and  
3 obviously, all of counsel have this case on a contingent  
4 basis, we've advanced the costs and if we did not win the case  
5 we would not get paid so there was a -- and I've gone over  
6 what the various risks of litigation were and there was a  
7 substantial issue as to whether or not we would win the case  
8 and therefore we had a substantial risk of non-payment.

9 The next issue is the amount of time devoted and  
10 that again shows the economy. I think it's pretty amazing of  
11 the amount of time that we devoted on this given the results  
12 and all we accomplished and that time is set forth in the  
13 petition and it's 12,656 hours and for a Lodestar of  
14 \$6,000,882 roughly.

15 And I think what we've asked for, Your Honor, is a  
16 fee that would be awarded on the percentage basis which was I  
17 think 17 -- I should know it by heart but I don't -- 17.8  
18 percent and it would result in a fee of \$18.5 million for all  
19 the counsel in the case.

20 We tried to look -- the next issue is the award of  
21 similar cases -- in similar cases and I tried -- we found  
22 three cases of fairly recent vintage that had settlement --  
23 class action settlements that were within the range of our  
24 settlement and what the awards were, and I'll go over those.

25 The first was the Rite Aid case which was 146 F.

1     Supp. 2d at 706 and that was a settlement of \$193 million and  
2     the award there was 25 percent and the multiple was between  
3     4.5 and 8.5, and I wasn't quite sure how they arrived at that  
4     but that's what the multiple was stated as.

5             The second case was the Ikon case in 194 F.R.D. 166  
6     at 195, which was an \$11 million settlement and it was an  
7     award of 30 percent with a multiple of 2.7. The third case  
8     was the Linerboard case which is reported in 2004 Westlaw  
9     1221350 which was a \$200 million settlement.

10            It had a percentage fee of 30 percent awarded and a  
11     multiple of two -- six -- I'm sorry, of 2.66, so our fee, what  
12     we've requested is less than 18 percent and I believe that the  
13     multiple comes out to be approximately 2.6 based on what we  
14     have expended up to the time of the petition that we submitted  
15     -- the petition.

16            However, as we pointed out, Your Honor, our role has  
17     not -- will continue. We have to monitor this and participate  
18     in the claims administration process, this hearing and  
19     whatever follows and we are not planning to seek any further  
20     fees after this award, so this award covers everything until  
21     the end.

22            Then there are the Prudential factors set forth in  
23     the Prudential case in the Third Circuit, 148 F. 3d at 33, 338  
24     and 340. The value of the benefits due to the attorney's  
25     efforts as opposed to the efforts of other groups, there were

1 no other groups, no other efforts this settlement is entirely  
2 product of our petitioning attorney's efforts.

3 Secondly is the private contingent fee negotiated  
4 would be -- I think that the standard is anywhere's between  
5 33-and-a-third and 40 percent in most cases where there is a  
6 private contingent fee, so this is well within that range.

7 And the third issue to look at under Prudential is  
8 innovative terms, and I think this settlement reflects several  
9 of those. One is the fact that if over five percent of the --  
10 of a wall is damaged -- has a qualifying damage to it, the  
11 entire wall gets replaced. That is very innovative.

12 Secondly, I mentioned at the end of the settlement  
13 approval argument all of the various friendly items that are  
14 involved in this settlement -- the friendly terms which help  
15 class members and encourage class members to file claims, even  
16 if they're rejected in the first instance.

17 And the third issue is the fact that we got cash  
18 rather than product or something else because cash -- cash is  
19 cash and if this -- if this product were done by on product,  
20 it obviously -- what CertainTeed sells -- the price of a  
21 product that CertainTeed sells is a lot more than it costs  
22 CertainTeed to replace.

23 So in fact, the fact that this is a cash settlement  
24 gives it more value. It also gives the class members the  
25 flexibility to replace -- to replace the damaged product or

1 its walls with anything else, any other product that it wants.  
2 So, I think these issues are -- make this a very, very  
3 attractive settlement and the terms are -- I think are --  
4 several of them are quite imaginative.

5 So I want to get back for a second to the multiple,  
6 Your Honor, because I know that's something that sometimes  
7 people like to attack, but again, I want to stress the  
8 cooperation and the efficiency of plaintiff's counsel.

9 If we had not worked cooperatively with  
10 CertainTeed's counsel -- and I'm sure that Your Honor must  
11 have noticed that we really -- we never had to appear before  
12 you with the discovery issue or any other issue with the case  
13 until we got to the preliminary approval stage.

14 That was all done because of the professionalism and  
15 the cooperation of counsel, between the parties and also our  
16 foresight to start the settlement negotiations early on in the  
17 case, even while we we're litigating.

18 So I say it took about an 18 month period from the  
19 time they started to the time we reached an agreement. But  
20 all that time we were litigating too, but everybody had the  
21 foresight to start that process early on.

22 So if we hadn't done that, if we hadn't had that  
23 cooperation and hadn't started that process early, then our  
24 Lodestar would have been higher, or if we hadn't had the  
25 organization and the sufficient -- and the cooperation that

1 we've had amongst the plaintiff's counsel, our Lodestar would  
2 have been a lot higher.

3 So I don't think we should be penalized for all  
4 things that that we've done that resulted in the Lodestar  
5 being lower and I think that the 2.6 multiplier in this case  
6 is certainly a good cross check for the 18 -- the 17.8 percent  
7 fee that we're asking, so we ask Your Honor if you would be  
8 kind enough to award that to all of the class counsel. That  
9 takes care of that.

10 We also have a petition out for an incentive fee for  
11 the named plaintiffs and I think that was basically addressed  
12 earlier so --

13 THE COURT: (Inaudible).

14 MR. MONTAGUE: Okay, thank you very much.

15 MR. MANOCHI: Thank you, Your Honor. There's two  
16 basic points I would like to raise with regard to the  
17 attorney's fees. The first point is again, I keep coming back  
18 to Baby Products just in the sense that there's relevant  
19 language there and I think it's relevant for the purposes of  
20 determining attorneys fees as well.

21 Our arguments before were really based on the size  
22 of the fund and I want to make sure the Court understands  
23 because I don't think that class counsel understood, we're not  
24 -- we're not objecting and weren't objecting to whether or not  
25 CertainTeed's big enough or tall enough to fund the thing.



1           We're objecting because there is a burden on them to  
2     provide evidence of that to meet the requirements under Baby  
3     Products so whether or not they have or they haven't is a  
4     matter of evidentiary proof. We don't believe it's there.

5           THE COURT: Evidence of?

6           MR. MANOCHI: It's a matter of evidentiary proof of  
7     some sort.

8           THE COURT: Of what?

9           MR. MANOCHI: Of -- well, there's certain burdens  
10    that we believe --

11          THE COURT: Of what?

12          MR. MANOCHI: Of --

13          THE COURT: Evidentiary proof of what?

14          MR. MANOCHI: Well, that they have the financial  
15    wherewithal.

16          THE COURT: Well, why isn't -- if you're objecting,  
17    why isn't it incumbent on you to come forth with at least some  
18    proof that creates doubt in my mind that the defendant has the  
19    ability to make these payments?

20          MR. MANOCHI: Because I think the burden is on the  
21    movants to establish that this is fair. They have negotiated  
22    an agreement that says over four years these are the payments  
23    that are going to be had.

24          We would expect some sort of even elemental proof of  
25    some sort that there's the financial wherewithal. And

1 granted, our objection continues to be that the attorney's  
2 standing up here and saying these guys have 6,000 employees  
3 and they're a subsidiary of a French company I don't think  
4 meets that burden. But --

5 THE COURT: Your objection is merely speculative,  
6 isn't it?

7 MR. MANOCHI: Well again, it's a burden of proof.  
8 They have -- you know, if they're saying these monies are  
9 going to come in and it's \$103 million fund, we believe that  
10 they have the burden to show that that money --

11 THE COURT: Now you're conceding it is a \$103  
12 million fund.

13 MR. MANOCHI: Excuse me?

14 THE COURT: Now you're conceding it is a \$103  
15 million fund.

16 MR. MANOCHI: Well, for the purposes of the argument  
17 here today, you know, and based on the fact that they  
18 submitted a non-reversionary supplement, that that's what  
19 they're showing today. And all I'm saying is that I think the  
20 proof -- the burden of proof is on them to show it, not on us  
21 to disprove it.

22 THE COURT: Well, the burden of proof is on them to  
23 show what's the fairer settlement.

24 MR. MANOCHI: And I think one of those elements is  
25 is the money going to be there in four years and I think that

1 that's what our objection is, not for us to say it's not going  
2 to be there in four years, but they're the ones that have the  
3 financial ability to determine where this is.

4 In any event -- may I continue?

5 THE COURT: Yes, please.

6 MR. MANOCHI: Thank you. In any event, it's again  
7 we come back to In Re: Baby Products which if I might be able  
8 to quote, Your Honor, there's an additional element in  
9 addition to what class counsel has indicated today, which is  
10 that in addition -- addition to the Girsh and Prudential  
11 factors, there's an additional requirement -- additional  
12 inquiry as to a thorough analysis of the settlement terms to  
13 the degree of the direct benefit provided to the class, and  
14 there's a number of factors that Your Honor can consider.

15 And that Court -- the Third Circuit goes on to say  
16 that "the inquiry needs to be as much as possible practical  
17 and not in the abstract," and then it -- and it requires that  
18 if there's not the proof in front of the Court, that the Court  
19 should require the parties to put that forth. And it all ties  
20 into the award of the attorney's fees.

21 Again, our objection is that we don't understand or  
22 don't or don't know and there's no proof of any sort in front  
23 of this Court as to what the actual value of the claim is  
24 going -- actual value of the settlement is going to be, and  
25 it's -- if they're saying it's \$109 million, again, we believe

1     there has to be some sort of to carry the burden of proof  
2     under In Re: Baby Products, that they show through some sort  
3     of actuarial or factual or some sort of showing, some sort of  
4     evidentiary showing what the estimated range of the settlement  
5     is going to be.

6             THE COURT: Well, I just heard a representation in  
7     this Court to which you would just agree, that CertainTeed is  
8     going to pay. You're saying they have the burden to show, I  
9     understand your oral argument there to show that CertainTeed  
10    has the ability to pay it. But I think it's beyond question  
11    that CertainTeed has agreed to pay \$103 million. So that's --

12            MR. MANOCHI: If that is what Your Honor is  
13    determining based on the -- on the representations --

14            THE COURT: Well, that's what you just said  
15    yourself.

16            MR. MANOCHI: Based on what I've heard in the  
17    courtroom and based on what they're telling us.

18            THE COURT: Well, that's a judicial concession.  
19    It's binding on (inaudible).

20            MR. MANOCHI: Hm-hmm, okay and if that is the case,  
21    if that is the case that they are -- they are intending to pay  
22    the \$109 million then --

23            THE COURT: They're bound by what they've said in  
24    this courtroom.

25            MR. MANOCHI: Okay. If I might move on then, Your

1 Honor?

2 THE COURT: Very well.

3 MR. MANOCHI: I also think that based on the fact  
4 that there -- we have no idea of what the range is and when  
5 it's going to get paid, I do believe that the payment of the  
6 attorney's fees should track the payments that are being made  
7 to the class.

8 In other words, to the extent that counsel today is  
9 expecting \$18.5 million and the ability to pay that all at  
10 once to them with not waiting as class members have to wait  
11 for six years for a portion -- for whatever remains under the  
12 fund --

13 THE COURT: Well, why isn't this like a structured  
14 settlement in the (inaudible)? Under Pennsylvania law, a  
15 structured settlement in a personal injury case, the lawyer  
16 gets his feet up front. Why isn't this the same thing?

17 MR. MANOCHI: Well, it's a determination of fairness  
18 on your part, Your Honor. If you believe that that's fair  
19 based on the submissions that are in front of you, then that  
20 is fair. I --

21 THE COURT: Well, they've already done the work.

22 MR. MANOCHI: Again, we have -- our objection is  
23 that we don't know what the size and the total and when those  
24 monies are coming in. Again, it gets back down to the  
25 evidence of what happens, for instance, if for some reason

1 CertainTeed can't make the payments.

2 THE COURT: Yes, but that's pure speculation on your  
3 part and it all comes down to your argument that they have to  
4 prove that CertainTeed has the ability to make these payments  
5 which they have legally obligated themselves to make.

6 MR. MANOCHI: Right. But again, we're going out  
7 four years and a lot can happen in four years.

8 THE COURT: That's the whole basis really of your  
9 position since you (inaudible).

10 MR. MANOCHI: Well, to the extent that we don't  
11 believe that counsel is getting paid before the class members  
12 is fair, that's part of that argument, you're right, Your  
13 Honor.

14 THE COURT: Well, it seems to me it's like a  
15 structured settlement (inaudible). You're at a disadvantage  
16 because I'm the lawyer who 35 years ago defended the lawyer  
17 who established that proposition in the Superior Court.

18 MR. MANOCHI: Your Honor, then I've met my match,  
19 Your Honor.

20 THE COURT: No, you haven't.

21 MR. MANOCHI: Thank you. I appreciate your time.

22 THE COURT: I will consider your arguments. Thank  
23 you. All right, anything else?

24 MR. MONTAGUE: Nothing more, Your Honor.

25 THE COURT: Anything else from anybody? All those

1     silent people down there, if anybody wants a chance?

2             Okay, thank you very much. We will take this matter  
3     under advisement. Thank you all very much. That was helpful.

4             (Proceedings concluded, 11:57 a.m.)

5

6                     C E R T I F I C A T I O N

7

8

9             I, Diane Gallagher, court-approved transcriber,  
10     certify that the foregoing is a correct transcript from the  
11     official electronic sound recording of the proceedings in the  
12     above-entitled matter.

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17     \_\_\_\_\_  
DIANE GALLAGHER

\_\_\_\_\_  
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18     DIANA DOMAN TRANSCRIBING